IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. REA

STATE OF NEBRASKA, APPELLEE,
V.
STEVE M. REA, APPELLANT.

Filed April 6, 2010. No. A-09-720.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Steve M. Rea appeals from a conviction and sentence for driving under the influence (DUI), fourth offense, after a jury trial. Rea asserts that the trial court erred in denying his motions to suppress a traffic stop, field sobriety tests, and his arrest. Rea also argues that the trial court erred in admitting evidence of a horizontal gaze nystagmus (HGN) field sobriety test, declining to instruct the jury regarding the admissibility of the HGN test, and determining that two Wyoming convictions were admissible and valid for purposes of sentence enhancement. Because Rea's assigned errors are without merit, we affirm the district court's judgment.

BACKGROUND

On June 15, 2008, Nebraska State Patrol officer Manuel Jimenez stopped Rea after he noticed that Rea was driving toward him with parking lights turned on, but without headlights. It was approximately 8 p.m., but it was not yet dark. Upon approaching the vehicle, Jimenez noticed the scent of an alcoholic beverage coming from within the vehicle. Jimenez also noticed

that Rea's eyes were a little glossy and a little red. After Rea manipulated the controls in his vehicle, he was able to turn on his headlights.

Jimenez then asked Rea to sit in the patrol car so that he could give Rea a warning for the parking light violation. While Rea was in the patrol car, Jimenez could smell the odor of alcoholic beverage on Rea. Jimenez asked Rea how long it had been since his last drink, and Rea responded that his last drink was at 3 a.m., i.e., approximately 17 hours earlier.

Jimenez then administered field sobriety tests. In the HGN test, Rea failed all six test measures because Rea showed a distinct nystagmus, or jerkiness of the eye, in each of them. Jimenez then administered a one-legged stand test which Rea passed. Jimenez also administered a walk-and-turn test, which Rea passed. However, Rea did raise his arms a little bit in the walk-and-turn test even though Jimenez requested that he keep his arms down. Jimenez then gave Rea a preliminary breath test (PBT), which Rea failed, the results of which were not admitted into evidence at trial.

Jimenez then arrested Rea and transported him to the Scotts Bluff County jail to administer a Breathalyzer test. This showed that Rea had a breath alcohol concentration of .11 of a gram of alcohol per 210 liters of breath.

In a search subsequent to Rea's arrest, Jimenez found a bottle of whiskey that had been opened and was almost empty under the driver's seat of Rea's vehicle.

On July 23, 2008, Rea was charged with DUI, fourth offense. On January 9, 2009, Rea filed a motion to suppress evidence resulting from the stop. At the February 6 hearing on this motion, Rea adduced evidence that Jimenez had stopped Rea for a parking light violation. Rea argued that Jimenez stopped him illegally because he did not actually commit any violation. Rea asserted that the statute which proscribed driving with parking lights only--Neb. Rev. Stat. § 60-6,227 (Reissue 2004)--had been repealed and that the effective date of the repeal was prior to the traffic stop. The district court denied the motion to suppress because it determined that § 60-6,227 was still in effect at the time of the stop.

On March 25, 2009, Rea filed a "Motion to Suppress Arrest and Motion to Reconsider Motion to Suppress Stop" and a "Motion in Limine" which requested that the court prevent the State from introducing evidence at trial of the HGN test. At the hearing on these motions, Rea called Jimenez and Robert La Pier to testify. La Pier, a former law enforcement officer who had expertise in the administration of field sobriety tests including the HGN test, testified that Jimenez had not administered the HGN test correctly. He reached this conclusion by comparing the methods prescribed by the National Highway Traffic Safety Administration (NHTSA) for the administration of the HGN test with Jimenez' testimony at that suppression hearing and Jimenez' deposition testimony. Jimenez' deposition testimony is not in the evidentiary record of this motion to suppress. La Pier testified that Jimenez was holding and moving the stimulus for incorrect amounts of time. La Pier stated that in checking for smooth pursuit, Jimenez was supposed to move the stimulus "two seconds out, two seconds back, two seconds out, two seconds back." Jimenez had testified that he was trained to spend 3 to 5 seconds moving the stimulus across the face. La Pier also testified that in checking for maximum deviation, Jimenez should have held the stimulus at maximum deviation for at least 4 seconds. Jimenez testified at the suppression hearing that he held the stimulus at that location "long enough for me to see--for me to make a decision whether I can see it or I don't" and admitted that "[i]t could be a second

or two." In addition, La Pier testified that Jimenez erred in failing to check equal tracing and pupil size, which serves the purpose of testing for certain medical conditions. There was no evidence adduced that Rea had any such medical condition.

The court denied the motion to suppress the arrest based on its conclusion that Jimenez was aware that Rea had violated the rules of the road, was unsure whether his headlights were on or off, had "glossy and red" eyes, smelled of alcoholic beverage, and "displayed possible alcohol impairment during the HGN testing." The court also denied the motion in limine regarding the HGN results. The court largely discounted La Pier's testimony because his opinions were based on Jimenez' deposition testimony which was not in the record and because the HGN test was a field test which the court determined was not designed to be conducted in a precise manner.

At the jury trial, Jimenez also testified. Rea called Paul Cobb to testify regarding the lights which Rea had on at the time of the stop. Cobb testified that these lights were not related to the vehicle being in "park" and are not activated when the emergency brake was on or when the car was placed in "park."

At the jury instruction conference, Rea proposed a jury instruction which would have required the jury to determine the admissibility of the HGN test. The judge declined to give this jury instruction, and the jury ultimately convicted Rea of DUI.

At an enhancement hearing, the State offered into evidence the records of three prior DUI convictions. Two of the records were for Wyoming convictions, and one was for a Nebraska conviction. The State also offered into evidence a copy of the Wyoming DUI statute. The court found that all three convictions were admissible, valid prior convictions and determined that the instant conviction was a fourth offense. The court sentenced Rea to 270 days' imprisonment and suspended his operator's license for 15 years.

Rea timely appeals.

ASSIGNMENTS OF ERROR

Rea assigns, restated and reordered, that the district court erred in (1) overruling Rea's motion to suppress the stop, (2) determining that there was reasonable suspicion to request field sobriety tests, (3) admitting evidence of the HGN test at the motion to suppress and at trial, (4) determining that there was probable cause to arrest Rea, (5) denying Rea's jury instruction regarding the HGN test, and (6) determining that prior convictions were admissible for purposes of enhancement.

STANDARD OF REVIEW

A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo. *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008). When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress. *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

ANALYSIS

Motion to Suppress Stop.

Rea asserts that the district court erred in denying his motion to suppress the initial traffic stop made by Jimenez. Rea argues that the traffic stop should have been suppressed only because the lights that Rea had turned on at the time of the stop were not parking lights.

The State asserts that the trial court was not required to consider the evidence which Rea adduced solely at trial regarding the motion to suppress the stop. We observe that the basis on which Rea now argues that the court should have suppressed the stop was not presented to the trial court at his initial motion to suppress. In part, Rea bases his argument on the fact that Jimenez called the lights that Rea displayed "auxiliary lights" at the second suppression hearing and at trial, and not "parking lights" as he had identified them at the first suppression hearing. However, it is clear that Jimenez was referring to the same item throughout the entire proceeding because Jimenez consistently specified that the lights to which he referred were amber in color. We conclude that this slight inconsistency does not appear to be "new" evidence--it was simply a change in the terminology that Jimenez used to refer to the same object. However, Rea also bases his argument on Cobb's testimony that the amber lights were unrelated to parking or stopping the car. Rea did not introduce this evidence until trial and has supplied no reason why he was unable to do so at the suppression hearing.

In its argument that the trial court could not consider the evidence regarding suppression that was not presented until trial, the State cites to *State v. Pope*, 192 Neb. 755, 224 N.W.2d 521 (1974), which discusses the extent to which a trial court is required to revisit at trial its pretrial ruling on a motion to suppress. The portion of *Pope* to which the State cited is derived from the Nebraska Supreme Court's decision in *State v. Smith*, 184 Neb. 363, 167 N.W.2d 568 (1969). In *Smith*, the court stated that unless an error becomes evident at trial, a motion to suppress should be finally determined before trial. The court explained that "[i]t is clearly the intention of section 29-822 . . . that motions to suppress evidence are to be ruled on and finally determined before trial, even to permit an appeal before trial from an order suppressing evidence unless within the exceptions contained in the statute." *State v. Smith*, 184 Neb. at 369, 167 N.W.2d at 572. Neb. Rev. Stat. § 29-822 (Reissue 2008) permits a felony defendant to file a motion to suppress "at least ten days before trial or at the time of arraignment" and provides an exception to the 10-day requirement "where the defendant is surprised by the possession of . . . evidence by the state" or "where the defendant was not aware of the grounds for the motion before commencement of the trial." The *Smith* court further explained that although a motion to suppress should be determined before trial, "a trial court is not precluded from correcting errors at the trial." 184 Neb. at 370, 167 N.W.2d at 572.

In *State v. Pope, supra*, the court discussed *Smith* in the context of the defendants' argument on appeal that the trial court should have suppressed evidence at trial where the defendants failed to preserve the record of the suppression hearing. The court determined that

based on *Smith*, the State was not required to re-prove the admissibility of evidence, and that the trial court was not required to revisit the admissibility of evidence which the defendants had previously but unsuccessfully sought to suppress. In this regard, the *Pope* court explained that "the State, having once established the legality of police searches, is not again obligated, at trial, to prove that legality when introducing the evidence obtained through those searches." 192 Neb. at 759, 224 N.W.2d at 525. The *Pope* court further explained that

> although it is true that State v. Smith, *supra*, does give the trial court the option to rule anew during trial on the question of the legality of a police search, it does not require the court to do so, the obvious reason being that such a requirement would completely undo the statutory scheme established by [the sections governing motions to suppress].

192 Neb. at 759-60, 224 N.W.2d at 525. First, the court reasoned that this would defeat the purpose of the statute that permits the State to appeal a suppression motion before trial, see Neb. Rev. Stat. § 29-824 (Reissue 2008), because the State would be unable to file such an appeal if it had to do so posttrial. Second, the court reasoned that this interfered with the purpose of § 29-822 (requiring that suppression motions be filed pretrial), which the court stated was "to avoid interference with the progress of the trial by freeing the trial court from the necessity of determining the collateral issue of the legality of the searches during the trial itself." *State v. Pope*, 192 Neb. at 760, 224 N.W.2d at 525-26.

Both *Smith* and *Pope* indicate that a trial court's power to revisit its suppression rulings at trial is discretionary and serves the purpose of correcting error. These cases do not answer the question of whether it would be a reversible error for a trial court not to "correct" its suppression ruling where new evidence adduced at trial (but available at the suppression hearing) would have required the court to reverse its previous ruling if that evidence were adduced at the suppression hearing. However, we conclude that regardless of the answer to this question, the trial court did not err in overruling Rea's motion to suppress the stop.

In disposing of this assigned error, we assume without deciding that the court was required to consider all of Rea's evidence on the issue of suppression regardless of whether it was adduced at a suppression hearing or at trial. Because Rea committed a traffic violation, Jimenez had probable cause to stop Rea's vehicle. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008). In the instant case, the State asserts that Rea violated § 60-6,227, which, at the time Rea was stopped, declared it unlawful for "any person to drive on any of the highways of this state with only parking lights turned on."

Rea argues that because these lights were illuminated while the car was moving, had no relationship to the vehicle's being parked, and were described by Jimenez as "auxiliary lights" at trial, they were not parking lights. Rea's argument that the lights on his vehicle were not parking lights because they were not related to parking makes little sense in the context of § 60-6,227. If the lights were operable only when the vehicle was parked, it would not be useful or necessary to create a statute that prohibited the use of these lights while a vehicle was in motion. When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result. *In re Estate of Cooper*, 275 Neb. 297, 746 N.W.2d 653 (2008).

In addition, the fact that Jimenez referred to these lights as auxiliary lights at trial does not mean that Jimenez erred in originally describing the lights on Rea's vehicle as parking lights. In both instances, Jimenez made it clear that the lights he saw on Rea's vehicle were amber-colored lights and not headlights. What Jimenez described were parking lights in the ordinary sense in which these words are used. In the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning. *Loves v. World Ins. Co.*, 276 Neb. 936, 758 N.W.2d 640 (2008). General knowledge informs us that the words "parking lights," as the term is used in today's world, refers to lights which may be illuminated while a vehicle is parked or while it is moving. See *State v. Tucker*, 242 Neb. 336, 494 N.W.2d 572 (1993) (general knowledge of word "cool"). For example, the 2009 Nebraska Driver's Manual, in a section entitled "Driving at Night," specifies that "[d]riving with parking lights only is unlawful" but does not provide a definition for parking lights. Similarly, federal regulations governing "lamps, reflective devices, and associated equipment," do not define parking lights in terms of their use but specify that on passenger cars, parking lamps consist of two amber or white lamps on the front of the vehicle one "on each side of the vertical centerline, at the same height, and as far apart as practicable." 49 C.F.R. § 571.108, tbls. III and IV (2009). Jimenez testified that he saw Rea's vehicle as it approached him, saw lights that were amber in color, which he called either parking lights or auxiliary lights, but saw no headlights. What Jimenez viewed fits the generally understood meaning of parking lights.

Rea has asserted that Nebraska law does not define parking lights for purposes of § 60-6,227, which is true. However, when a commonly used term is not defined in statute, it does not mean that it acquires a definition other than that which is ordinarily used or that Rea is entitled to create his own definition. We find no merit to Rea's assignment of error.

Reasonable Suspicion.

Rea next asserts that Jimenez did not have reasonable suspicion to continue to detain him for the purpose of conducting field sobriety tests. In order to continue to detain a motorist, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the stop. *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008). Field sobriety tests may be justified by a police officer's reasonable suspicion based upon specific articulable facts that the driver is under the influence of alcohol or drugs. *Id.* The reasonable suspicion must be determined on a case-by-case basis. *Id.*

The trial court's factual findings in this regard were as follows:

> As Jimenez approached the truck he observed coolers strapped to the truck bed and another cooler in the cab. He described the driver as "appearing nervous." Jimenez detected a scent of alcoholic beverage from inside the truck cab. He described Rea's eyes as a bit glossy and reddish. He noticed Rea's eyes were jittery and didn't pursue smoothly from side to side. These observations were significant to Jimenez as indicating possible impairment due to alcohol or drugs. . . .
>
> Jimenez advised Rea of the reason for the stop. Rea responded he thought his headlights were on. He exited the truck to check and discovered they were not on. Jimenez asked Rea for his driver's license, vehicle registration[,] and proof of insurance. Rea provided him with a yellow administrative license revocation form as evidence of his

> driving privileges. Jimenez checked the status of Rea's driver's license, and learned it was suspended. Jimenez had Rea sit in his patrol vehicle. When asked, Rea acknowledged that this was not the first time he had been arrested. Once Rea was placed in the patrol car Jimenez continued to detect an odor of alcoholic beverage about Rea's person. Jimenez continued to notice redness, glossiness, and nystagmus in Rea's eyes. Rea acknowledged drinking alcoholic beverages earlier that date.

These findings of fact are not clearly erroneous based on the record before us. Therefore, we turn to the question of whether these facts were sufficient to show that Jimenez had reasonable suspicion. Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006).

Both briefs discuss *State v. Royer*, *supra*, and *State v. Pickinpaugh*, 17 Neb. App. 329, 762 N.W.2d 328 (2009), which both discuss the factual circumstances sufficient to justify the administration of field sobriety tests. In *Royer*, the court determined that reasonable suspicion existed where the arresting officer observed that the driver's eyes were watery and bloodshot and detected a strong odor of alcohol on the driver's breath and the driver admitted to having consumed four or five alcoholic beverages. In *Pickinpaugh*, the court found that reasonable suspicion existed where a police officer knew that the driver's vehicle had hit a utility pole; where the police officer noticed that the driver had watery and bloodshot eyes, slurred speech, and an odor of alcohol; and where the driver admitted to having had a number of drinks that evening.

Although the instant case is not identical to either *Royer* or *Pickinpaugh*, we conclude that under the factual circumstances, Jimenez had reasonable suspicion to conduct field sobriety tests. As in *Royer* and *Pickinpaugh*, the officer noted the smell of alcohol, the driver's eyes were red and glossy, and the driver admitted to having consumed alcoholic beverages. In the instant case, the officer also noted that Rea's eyes were jittery and did not track smoothly. These facts are sufficient to provide at least a "minimal level of objective justification" to detain Rea for purposes of administering field sobriety tests.

HGN Test.

Rea argues that the results of the HGN test are not admissible because Jimenez did not administer the test correctly. A police officer may testify to the results of HGN testing if it is shown that the officer has been adequately trained in the administration and assessment of the HGN test and has conducted the testing and assessment in accordance with that training. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). In *Baue*, an officer's training in the administration of the HGN field sobriety test pursuant to NHTSA standards at the Nebraska State Patrol Academy as part of a 40-hour course on DUI was adequate. Jimenez completed the State Patrol's 40-hour course on DUI and was trained in administering the HGN field sobriety test pursuant to NHTSA standards.

The remaining question is whether Jimenez conducted the HGN test in accordance with his training. Rea called La Pier to testify that Jimenez had not performed the test entirely in accordance with NHTSA standards. Jimenez testified at trial that he conducted the testing in

accordance with his training. After reviewing the record, it appears that Jimenez followed the NHTSA standards closely, but not exactly. The question becomes whether the test must be administered "perfectly" for the results to be admissible. Although this is not a question we have answered in the context of field sobriety tests, we have answered the question in the context of evidentiary alcohol level tests. We have determined that the results of such a test are inadmissible if the administering officer fails to use the correct "method," (i.e., a principle of analysis) but are admissible if the officer fails to use the proper "technique." See *State v. Rodriguez*, 18 Neb. App. 104, 774 N.W.2d 775 (2009). See, also, *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990); *State v. Green*, 223 Neb. 338, 389 N.W.2d 557 (1986); *State v. Trampe*, 12 Neb. App. 139, 668 N.W.2d 281 (2003).

We derive from this precedent that minor imperfections in the administration of a test or assessment do not render it inadmissible but instead go to the weight of the evidence. In contrast, the failure to perform the correct test or assessment as a whole negates admissibility. In the instant case, the evidence indicates that the HGN test, as a whole, was performed in the correct manner but with minor imperfections.

Further, field sobriety tests were not designed to be administered with absolute precision. An officer in the field cannot reasonably be expected to move and position the stimulus with the exact timing and in the precise location that are specified by the NHTSA standards. The Nebraska Supreme Court has recognized this in the particular weight it accords to HGN test results. The court stated that when the HGN test is given in conjunction with other field sobriety tests, the results are admissible for the limited purpose of establishing that a person has an impairment which may be caused by alcohol. See *State v. Baue, supra*. Further, evidence of an HGN test, standing alone, is not sufficient to sustain a DUI conviction. See *id*. Thus, it makes sense that the test is not one that need be administered precisely. We therefore conclude that the district court did not abuse its discretion in admitting into evidence the results of the HGN test.

Probable Cause to Arrest.

Rea also argues that Jimenez lacked probable cause to arrest him for DUI. When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

In the instant case, the trial court's order following the hearing on Rea's second suppression motion made extensive factual findings. We have already quoted the first portion of those findings in our discussion of Rea's motion to suppress the field sobriety tests. In addition to the findings which we quoted above, the court also found that Jimenez failed all six portions of the HGN test, "passed the other two field sobriety tests with minimal difficulties," and failed a PBT. These findings of fact are not clearly erroneous.

We conclude that Jimenez' observations combined with Rea's poor performances on the HGN test and the PBT established probable cause for Rea's arrest and that the trial court did not err in overruling Rea's motion to suppress his arrest.

Rea's Proposed Jury Instruction.

Rea argues that the trial court erred in failing to administer his proposed jury instruction. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

Rea's proposed instruction was as follows:

> There has been evidence that the Trooper administered the [HGN] Test. In order for you to consider the test you must find that the officer was properly trained in the administration and assessment and has conducted the testing and assessment in accordance with that training. Otherwise, you must disregard the test.

This instruction was not a correct statement of the law, as it overstated the consequences should the jury find any defect in the officer's training or his administration of the HGN test. The instruction commanded the jury, if it found any flaw, no matter how minor, in such training or administration, to "disregard" the test. In effect, this instruction would have required the jury to determine whether the State had complied with the foundational requirements set forth in *State v. Baue, supra*. Thus, by means of this proposed instruction, Rea attempted to have the jury decide whether the HGN test was admissible, which is the function of the judge and not the jury. Neb. Rev. Stat. § 27-104 (Reissue 2008) requires that the judge determine the admissibility of evidence. As the Nebraska Supreme Court has said in the context of a test of body fluids for alcohol content, once the court determines that the foundational requirements have been met and the evidence admitted, the jury has no function other than to determine the credibility and weight to be given the evidence. *State v. West*, 217 Neb. 389, 350 N.W.2d 512 (1984). The jury is to consider the weight and credibility only of the test results, and not whether the foundational requirements necessary for admission of the tests were met. *Id.* The "all or nothing" approach of Rea's proposed instruction incorrectly attempted to control the jury's function in determining the credibility and weight to be given to this evidence. Thus, as Rea's proposed instruction was not a correct statement of the law, the trial court did not err in refusing to give the instruction.

Prior Convictions.

Rea argues that the Wyoming convictions were inadmissible and not valid for purposes of enhancement in two respects, which, for convenience, we address in reverse order. We first consider Rea's argument that one of the Wyoming convictions, a municipal court conviction, was inadmissible for purposes of enhancement because it was not properly authenticated in that it did not contain a judge's signature. We then turn to his other argument, which asserts that the Wyoming statute underlying the two convictions does not satisfy the comparability requirement of Neb. Rev. Stat. § 60-6,197.02(1)(a)(i)(C) (Cum. Supp. 2008).

The first argument fails at the very least because Rea relies upon language from a judicial decision which has been partially superseded by a statutory change. Rea asserts that in *State v. Miller*, 11 Neb. App. 404, 651 N.W.2d 594 (2002), this court stated that an out-of-state conviction record must contain a judge's signature for the record to be properly authenticated.

The documents in the record of one of the convictions contain a stamp which is filled out as follows:

> CERTIFIED A TRUE COPY
> Date 6/10/09
> /s/ Debbie Curry
> Clerk of Municipal Court
> Torrington, Wyoming

Obviously, this certification does not contain a judge's signature, as it is signed only by the court clerk. However, we need not consider whether under current law an authenticated copy must contain a judge's signature, as the current statute governing proof of prior DUI convictions permits the use of either a certified or an authenticated copy. Section 60-6,197.02(2) provides that in the case of a DUI conviction, "a court-certified copy or an authenticated copy of a prior conviction in another state" is prima facie evidence of a prior conviction for purposes of sentence enhancement. The language authorizing use of a "court-certified copy" was added to the statute by 2005 Neb. Laws, L.B. 594, § 2. This legislative change supersedes our *Miller* decision to the extent that either court-certified or authenticated copies are now permissible. Rea admits that the document "has the certification of the [court] clerk that the record is a true copy." Brief for appellant at 25. Thus, he effectively admits compliance with the alternative of a "court-certified copy." We therefore find no merit to Rea's argument that one of the Wyoming convictions was inadmissible because of the absence of a judge's signature.

We now turn to Rea's other argument attacking the use of both of the Wyoming convictions, in which he asserts that these convictions do not fulfill the requirement of § 60-6,197.02(1)(a)(i)(C) that "[a]ny conviction under a law of another state [is valid for enhancement purposes] if, at the time of the conviction under the law of such other state, the offense for which the person was convicted would have been a violation of section 60-6,196[.]"

Under this section, we must compare the Wyoming statute to the Nebraska statute. In Wyoming, the DUI offense for which Rea was twice convicted is defined in statute as follows:

> (b) No person shall drive or have actual physical control of any vehicle within this state if the person:
>
> (i) Has an alcohol concentration of eight one-hundredths of one percent (0.08%) or more; or
>
> (ii) To a degree which renders him incapable of safely driving:
>
> (A) Is under the influence of alcohol;
>
> (B) Is under the influence of a controlled substance; or
>
> (C) Is under the influence of a combination of any of the elements named in subparagraphs (A) and (B) of this paragraph.

Wyo. Stat. Ann. § 31-5-233 (2003). Alcohol concentration is defined in terms of alcohol per 100 milliliters of blood, per 210 milliliters of breath, or per 75 milliliters of urine. See *id.*

Neb. Rev. Stat. § 60-6,196 (Reissue 2004), the Nebraska statute that sets forth the elements of a DUI offense, is substantially similar and provides as follows:

> (1) It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:

(a) While under the influence of alcoholic liquor or of any drug;

(b) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or

(c) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.

Rea argues that a violation of the Wyoming statute would not necessarily be a violation of § 60-6,196 because a conviction can result under the Wyoming statute where the driver was under the influence of a combination of drugs and alcohol, but this could not occur in Nebraska.

We rejected a similar argument in *State v. Miller*, 11 Neb. App. 404, 651 N.W.2d 594 (2002). In *Miller*, we determined that the district court did not abuse its discretion in finding that an Iowa DUI conviction was valid for enhancement purposes where the defendant was convicted of operating "'a motor vehicle while under the influence of alcoholic beverage or other drug, or a combination of such substances, or while having ten hundredths (.10) or more alcohol concentration.'" 11 Neb. App. at 410, 651 N.W.2d at 599. The Nebraska statute was identical to its current form, except for at that time, the limit on blood alcohol level was ten hundredths. In *Miller*, the fact that Iowa law specifically proscribed operating a vehicle while under the influence of a combination of alcohol and drugs did not render that conviction unusable for enhancement purposes. Therefore, relying upon the *Miller* decision, we find no merit to Rea's argument.

CONCLUSION

The district court did not err in denying Rea's suppression motions. The district court did not abuse its discretion in admitting the results of Rea's HGN test into evidence because the officer who administered the test was adequately trained and administered the test in compliance with his training. The district court did not err in denying Rea's proposed jury instruction, which would have required the jury to determine the admissibility of evidence. The district court did not abuse its discretion in using Rea's prior out-of-state DUI conviction records for enhancement purposes because both were admissible and valid. We therefore affirm the judgment of the district court.

AFFIRMED.